APPENDIX

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APPENDIX A

COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

No. H033546
(Santa Cruz County Super. Ct. No. CV155146)

[Filed January 7, 2010]

JAMES SHEPARDSON, et. al.,)
)
Plaintiffs and Appellants,)
)
v.)
)
S. TODD MITCHELL,)
)

Defendant and Respondent.)
_____)

Plaintiff James Shepardson seeks review of an order confirming a settlement. He contends that the court modified the terms of the settlement without his consent. Defendant S. Todd Mitchell has filed no response. We will affirm the order.

Background

In his first amended complaint, plaintiff alleged that he was the heir of Clara Jean Shepardson, who died in September 2005 while being treated at Dominican Hospital (Dominican). S. Todd Mitchell (Dr. Mitchell) was the decedent's primary care physician and the medical director of the nursing facility where the decedent lived until she fell and sustained a serious head injury. The decedent's family believed that the hospital staff and Dr. Mitchell had "mishandl[ed]" her care, and in September 2006 plaintiff, individually and as trustee for the decedent's trust, initiated this action against Dr. Mitchell and Dominican. In the first amended complaint plaintiff asserted elder abuse, wrongful death, intentional and negligent infliction of emotional distress, breach of fiduciary duty, fraud and conspiracy, and related causes of action.

On April 11, 2008, plaintiff and Dr. Mitchell appeared for a settlement hearing on the claims against Dr. Mitchell. One of plaintiff's attorneys, Ralph Boroff, recited the terms, which consisted of a $5,000 payment from Dr. Mitchell, mutual releases, and a confidentiality agreement. The superior court questioned plaintiff to ascertain that he understood

and approved the terms, and he said that he did. Mr. Boroff added, in order "to be clear," that the release and confidentiality agreement, by which he meant "nondisparage," would apply "to all parties and Counsel." The court then ruled that the parties had entered into a binding settlement agreement enforceable under Code of Civil Procedure section 664.6.

Plaintiff's other attorney, his brother John Shepardson (who represents plaintiff on appeal), then asked, "What does nondisparagement mean?" A brief discussion among counsel followed, and the court suggested they confer outside.

When counsel returned, John Shepardson stated that he was willing to agree to confidentiality as to the settlement amount, but he would not agree "to muzzle my opinions in the future about the conduct that my mother had inflicted upon her by Dr. Mitchell. And so if the scope of the nondisparaging clause is simply that I will not make untrue or inaccurate statements, then I'm agreeable to that. But beyond that, hypothetically, if I were to write an article in the newspaper or a book about this event, I would not want to be sued for violation of a vague statement regarding nondisparagement." In the ensuing discussion John Shepardson continued to insist that he not be denied his own "free speech rights." His co-counsel, Mr. Boroff, explained that no one was talking about denying him his free speech rights. "What we're talking about is holding you solely to the standard that any comment that you make publicly about the Defendant not violate the law. And . . . your obligation under this . . . settlement agreement is to not say

untruthful things about the Defendant." John Shepardson replied, "I have no problem with that."

After further discussion counsel and the court decided to revise the agreement to state that the parties and their attorneys agreed "not to make any defamatory statements." The court then ensured that plaintiff concurred: "Mr. James Shepardson, with this additional term being added to the agreement that you will be bound not only to keep the amount in terms of the settlement confidential, but you will also be required not to make any defamatory statements against Dr. Mitchell. Do you agree in addition to all the other terms to be bound by that?" Plaintiff agreed. The court then asked John Shepardson whether he also agreed to be bound by that condition. He responded that he did.

On September 12, 2008, the parties appeared again on plaintiff's motion to confirm the settlement.[1] The court announced its intention to grant the motion and confirm the settlement using the definition of "defamation" found in the civil jury instructions, CACI No. 1700. John Shepardson insisted that the agreement had been only to prohibit "knowingly false statements." Over that objection, the court ordered the parties to execute the settlement and release, substituting the language of CACI No. 1700, "so that both parties are precluded from making defamatory statements about the other such that they are prohibited from making statements which are knowingly false or where the parties have serious doubts about the truth of the statement."

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[1] No written motion is in the record, nor is any reply.

The court asked Dr. Mitchell's attorney to prepare the written order. In early November, however, the court signed one order prepared by John Shepardson,[2] followed shortly thereafter by the order prepared by Dr. Mitchell's attorney. The second order confirmed the agreement with an express modification that defined "defamatory" in accordance with CACI No. 1700.

Discussion

1. Appealability

On appeal, plaintiff urges reversal on the ground that the court's modification included terms he had not agreed to in the April 11 settlement hearing. We cannot consider his argument, however, without first addressing his attempt to bypass the question of appealability.

Plaintiff's attorney, John Shepardson,[3] appears to recognize that he brought this appeal prematurely. He admits that he filed his brother's notice of appeal four days *before* the November 14 order, and two days

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[2] That order (which miscited the applicable CACI provision) represented that the court had "denied the motion to confirm, and treated the motion instead as a motion to clarify."

[3] The record of the proceedings below suggests that John Shepardson was involved in the proceedings as much as a litigant as counsel. He objected to certain terms of the settlement—in particular, the defamation language and the release terms-- on his own behalf more than for any benefit to plaintiff. John Shepardson will hereafter be referred to simply as "Shepardson."

before even the order he himself had prepared. Apparently eager to submit the notice of appeal, Shepardson obtained the court's signature on the first order and then signed the notice of appeal on the same day, November 7, 2008.[4] Although plaintiff incorrectly asserts that "[a] notice of appeal filed before entry of Judgment but after its rendition is valid as a matter of law," we have the authority to construe the appeal as if it had been taken from the judgment of dismissal. (See Cal. Rules of Court, rules 8.100(a)(2), 8.104; cf. *Los Altos Golf and Country Club v. County of Santa Clara* (2008) 165 Cal.App.4th 198, 202-203.) We elect to do so here.

2. Settlement Terms

Plaintiff identifies several terms that he believes should not have been added to the original settlement agreement. In a single heading he asserts, "There is no evidence that appellants[5] agreed to waive their constitutional First Amendment rights to petition and

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[4] Counsel states that he filed the notice of appeal on November10 because he was concerned that the 60-day period to appeal from the September 11 ruling was approaching. If that was his motivation, the precaution was clearly unnecessary. Since there was no written order on September 11, there was nothing from which to appeal. It is difficult to see how he could have been misled, because he went to the trouble of obtaining the judge's signature on a written order on November 7, which was filed November 12.

[5] Just to be clear, the only appellant is James Shepardson, acting for himself and as trustee for the decedent's trust. John Shepardson purports to be representing plaintiff, but from the record it appears that the interests he advances are at least as much his own.

free speech, or the litigation privilege, that the claim against respondent was a 'doubtful claim,' that the release included respondents' [*sic*] representatives other than counsel, that the confidentiality provision include negotiations prior to April 14 [*sic*], 2008, and that there was an attorney fees provision to enforce the agreement." (Capital letters and emphasis omitted.)

Only the first claim in this list was raised at the September 12 hearing. The rest are accompanied by no explanation or supporting argument. Plaintiff then adds the assertion that "The TC [*sic*] has forced Appellants waived [*sic*] their rights under Civil Code § 1542"--presumably because this statute was not mentioned at the April 11 hearing. That claim is disingenuous. The waiver of unknown claims, the exception to the general release covered in Civil Code section 1542,[6] was discussed not only at the September 12 hearing, but at the settlement hearing as well. The following colloquy took place at that time: "THE COURT: . . . Mr. Shepardson, you understand the terms of the settlement that have just been recited? [¶] [Plaintiff]: Yes, Your Honor. [¶] THE COURT: Okay. And you've had an opportunity to consult with your attorney about the advisability of accepting the settlement as opposed to proceeding with the case to trial? [¶] [Plaintiff]: Yes, Your Honor. [¶] THE COURT: And you, then, agree to be bound by the terms of the settlement which . . . would involve you

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[6] Civil Code section 1542 states: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

signing a settlement and release of *all claims* in exchange for the payment of $5,000 . . . ? [¶] [Plaintiff] Yes, Your Honor. [¶] THE COURT: All right. And it would resolve any and all claims which you're now aware of that you could assert, *including any claim which may be unknown* as a result of the death of your mother as against Dr. Mitchell? Do you understand that? [¶] [Plaintiff]: Yes, Your Honor. " (Emphasis added.)

Clearly the waiver of unknown future claims was recited at the settlement, even though it was not identified by statute. The citation and precise language of Civil Code section 1542 could have been explained by plaintiff's counsel, but whether it was or not, the court's admonition was sufficient to explain the nature of the waiver.

At the subsequent hearing on September 12, Dr. Mitchell's attorney pointed out that plaintiff had never objected to the waiver of Civil Code section 1542 in the post-settlement negotiations or moving papers.[7] To complain now, counsel argued, was inappropriate. The court asked Shepardson what prejudice would result if language waiving the benefits of Civil Code section 1542 were included. Shepardson was able to identify only an action that the Medical Board had thus far not pursued, but that it conceivably might "reinstitute." The court assured Shepardson that he would still be authorized to disclose any information contained in the

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[7] Without the record of the parties' briefing on the motion to confirm the settlement, we have no way of knowing what written objections were made to the form of the final settlement agreement.

release agreement if requested by the Medical Board; and the release would not preclude the Medical Board's pursuit of the original complaint against Dr. Mitchell. It is clear from the scant record provided by plaintiff that he was not "forced" to accept new terms and furthermore, that no prejudice resulted from the explicit mention of the statute containing the language plaintiff was waiving.

As to the definition of defamation, the discussion at the April 11 hearing culminated in a decision by counsel and the court that the settlement agreement would include a clause providing that neither party would make "any defamatory statements" rather than a vague clause precluding disparagement. In explaining the decision to Dr. Mitchell, the court stated that "there is a difference between a defamation, which is knowingly making a false statement as opposed to a disparaging statement, which is merely to make a belittling statement or to render an opinion that . . . does not constitute defamation. It's something of a different concept."

The final written agreement approved by the court in the November 14, 2008 order contained the following paragraph: "6. The parties to this Agreement, and their respective attorneys of record, hereby further agree that they will make no defamatory comments about any other party to this Agreement in any public or private forum. For purposes of the interpretation of this paragraph, the term 'defamatory' shall be defined, interpreted and construed according to CACI [No.] 1700."

On appeal, plaintiff argues, "The RT for the in-court settlement . . . shows that the agreed upon

definition of Defamation was 'knowingly making a false statement'. There is no evidence that defamation was as defined in CACI 17200." Erroneous CACI citation aside, his assertion is completely without merit. The only specific complaint he advances is that he is not permitted to make defamatory comments "in any public or private forum." Plaintiff queries, "Isn't this a waiver of the Constitutional rights to Petition and Free Speech? Doesn't this implicitly waive Appellants [*sic*] rights under C[ode of] C[iv.] P[roc.] 425.16, which protects a person's right to engage in Petitioning and Free Speech?"

How this case was suddenly converted to a Strategic Lawsuit Against Public Participation (SLAPP) is inexplicable. (See Code Civ. Proc., § 425.16.) The mention of a public or private forum adds nothing significant to the admonition not to make any false statement; it merely states that a defamatory statement may not be made anywhere. The April 11 settlement had not confined the prohibition on defamatory communications to one forum or another. Plaintiff offers no showing of harm from this minor amplification.

The simple answer to plaintiff's rhetorical question is *no*, paragraph 6 does not amount to a waiver of his free speech and petition rights. The First Amendment does not insulate defamatory conduct. (*Beauharnais v. People of State of Ill.* (1952) 343 U.S. 250, 266 [72 S.Ct. 725].) Libel and slander are among those "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social

value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Chaplinsky v. State of New Hampshire* (1942) 315 U.S. 568, 571-572.)

Shepardson should not have been surprised that the court adopted CACI No. 1700 as a benchmark for defining defamation. To the extent that plaintiff himself did not understand the meaning of the term, it was incumbent on his counsel to explain what "defamatory" means under the law. The CACI definition is useful for that purpose; it explains defamation in lay terms and does so correctly. Moreover, because it requires a jury to find proof beyond the mere uttering of a false statement, CACI No. 1700 offers a defendant (i.e., Shepardson or plaintiff, in the hypothetical lawsuit Shepardson apparently anticipates) more protection than the brief explanation given to Dr. Mitchell at the April 11 hearing. The instruction clearly sets forth the elements of the tort of defamation, the type of damages that may result, and the showing required for a plaintiff to recover compensation. There is nothing new about these principles or their relation to the First Amendment. (See *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 11-23 [110 S.Ct. 2695] [reviewing evolution of judicial recognition of defamation actions "since the latter half of the 16th Century"].)

In summary, there has been no showing whatsoever that the trial court exceeded its authority in clarifying the settlement terms in the parties' agreement. Dr. Mitchell wisely saved his money rather than go to the effort and expense of submitting a response to a clearly meritless appeal.

Disposition

The order is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

DUFFY, J.

Shepardson, et al. v. Mitchell
H033546

APPENDIX B

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SUPERIOR COURT
OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CRUZ

No. CV155146

[Filed November 14, 2008]

JAMES SHEPARDSON, individually and on behalf of the Trust of Clara Jean Shepardson,

Plaintiff,

vs.

S. TODD MITCHELL, M.D., CATHOLIC HEALTHCARE WEST, INC., DBA DOMINICAN HOSPITAL, and Does 1-100, inclusive,

Defendants.

~~[PROPOSED]~~ ORDER CONFIRMING AND CLARIFYING SETTLEMENT

DATE: 9/12/08
TIME: 8:30 a.m.
DEPT: 4
JUDGE: The Honorable Paul Burdick

The motion of plaintiff, JAMES SHEPARDSON, individually and on behalf of the Trust of Clara Jean Shepardson, came on regularly for hearing on September 12, 2008, at 8:30 a.m., in Department 4 of the above-court, the Honorable Paul Burdick, presiding. Plaintiff appeared by and through attorney John A. Shepardson, Esq.; defendant appeared by and through attorney David S. Spini, Esq. All arguments considered, and good cause appearing.

IT IS ORDERED: Settlement between the parties, as entered into in open Court on April 11, 2008, is confirmed, subject to the following additions and/or clarifications:

1. Paragraph 6 of the proposed Settlement Agreement shall be modified to define the term "defamation" consistent with that contained in CACI 1700;

2. The settlement shall include a Civil Code § 1542 Waiver;

3. The Settlement Agreement prepared on behalf of the defendant, and attached hereto as Exhibit "A", which includes the modification as to the term "defamation" shall be adopted by the parties and shall be duly executed by the parties.

IT IS SO ORDERED.

DATED: November 13, 2008

PAUL P. BURDICK
The Honorable Paul Burdick

Approved as to form.

/s/ John A. Shepardson
John A. Shepardson, Attorney for Plaintiff

/s/ David S. Spini
David S. Spini, Attorney for Defendant

EXHIBIT "A"

CONFIDENTIAL SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

This Confidential Settlement Agreement and Release of All Claims (hereinafter "Agreement") is made effective _____, 2008, by and between JAMES SHEPARDSON, individually and on behalf of the Trust of Clara Jean Shepardson (hereinafter "SHEPARDSON") and S. TODD MITCHELL, M.D. (hereinafter "MITCHELL").

RECITALS

A. WHEREAS, Clara Jean Shepardson died on September 3, 2005, while under the care of MITCHELL, Dominican Santa Cruz Hospital, and various other doctors and nurses;

B. WHEREAS, on February 9, 2007, SHEPARDSON filed a First Amended Complaint in Santa Cruz County Superior Court, case number CV155146, entitled *James Shepardson, individually and on behalf of the Trust of Clara Jean Shepardson, plaintiff, vs. S. Todd Mitchell, M.D., Catholic Healthcare West, Inc., dba Dominican Hospital, and Does 1 through 100, inclusive, defendants*, alleging multiple causes of actions, and

C. WHEREAS, the parties conducted extensive discovery regarding the litigation, and on April 11, 2008, the litigation was settled pursuant to an oral stipulation in Court, reported in the Court proceedings and consented to by each of the parties before the Honorable Paul Burdick.

AGREEMENT

THEREFORE, in consideration of the mutual terms, condition and covenants set forth herein, and for other good and valuable consideration, the parties do agree as follows:

1. For and in consideration of the sum of Five Thousand Dollars ($5,000.00), to be paid as set forth below from MITCHELL to SHEPARDSON, SHEPARDSON agrees as follows:

A. SHEPARDSON hereby releases and fully discharges MITCHELL, his agents and representatives, attorneys and insurers from any and all rights, claims demands, causes of action, and damages, compensatory, exemplary, or by way of discovery sanction order, or otherwise, that SHEPARDSON now or in the future may have of any kind, now existent or which become existent in the future, whether the same be now known or unknown, or whether the same be now anticipated or unanticipated arising from those matters set forth in the litigation or as a result of the death of Clara Jean Shepardson.

B. SHEPARDSON hereby relinquishes and waives all rights conferred upon SHEPARDSON by the provisions of § 1542 of the Civil Code of the State of California, which reads as follows:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have

materially affected his settlement with the debtor."

C. SHEPARDSON shall forthwith abandon the prosecution of the litigation pending in the Santa Cruz County Superior Court against MITCHELL, and hereby authorizes his attorneys of record to forthwith execute in legal form and deliver to MITCHELL in care of his attorney of record a Request for Dismissal with prejudice of the Complaint against MITCHELL.

D. Payment of the Five Thousand Dollars ($5,000.00) shall be made payable to JAMES SHEPARDSON, and his attorneys, JOHN SHEPARDSON.

2. In making this Agreement, SHEPARDSON has not relied on statements or representations regarding his rights or claims for damages by the parties being released, their agents, or representatives. On the contrary, SHEPARDSON has considered all of these matters himself and has received advice of independent counsel and has relied entirely on his own judgment.

3. The amount of this settlement is a compromise settlement of a doubtful and disputed claim for all damages and other relief as referred to in the litigation. This settlement is not to be considered or construed as an admission of any responsibility whatsoever, in whole or in part, for any allegation in the litigation, or that could have been alleged in the litigation, by the parties released, their agents or representatives.

4. In further consideration of the full and timely performance of all terms and conditions in this agreement, MITCHELL hereby releases and fully discharges SHEPARDSON, his agents and representatives, and an other person or entity from any and all rights, claims, demands, causes of action and damages, compensatory, exemplary or otherwise, that MITCHELL now or in the future may have of any kind, now existent or which become existent in the future, or whether the same be now known or unknown, or whether the same be now anticipated or unanticipated arising from those matters set forth in the litigation, or as a result of the death of Clara Jean Shepardson, or the prosecution of this litigation.

5. The parties agree that the terms, amounts, and negotiations leading to the stipulation in Court on April 11, 2008, and this Agreement shall remain strictly confidential. The parties agree not to disclose any information concerning the terms, amounts, negotiations preceding this Agreement, including but not limited to the proceedings on April 11, 2008, or the terms of this Agreement to anybody except their necessary legal advisors, tax advisors, insurers, and governmental entities having a right to compel disclosure of such information, except as otherwise agreed to by the parties. If the parties or their legal advisors are asked about this Agreement or the subject matter of the litigation, the parties shall inform any person who so inquires that the parties have satisfactorily resolved any disagreement that may exist between them and have agreed not to discuss the matter with anyone. Further, the parties agree that following the file of a dismissal, the Court shall have continuing jurisdiction for the purposes of enforcing this confidentiality provision.

6. The parties to this Agreement, and their respective attorneys of record, hereby further agree that they will make no defamatory comments about any other party to this Agreement in any public or private forum. For purposes of the interpretation of this paragraph, the term "defamatory" shall be defined, interpreted and construed according to CACI 1700.

7. The parties hereto acknowledge and agree that each are to bear their own costs, expenses and attorney's fees arising out of or connected with the litigation, the negotiations, drafting and execution of this Agreement, and all other matters arising out of or connected therewith, except that in the event any action is brought by any of the parties to enforce this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs of suit.

8. This Agreement may be executed in counterparts, and all so executed shall constitute one Agreement which shall be binding upon all parties hereto, notwithstanding that all parties signatures do not appear on the same page.

_____

JAMES SHEPARDSON, individually and on behalf of the Trust of Clara Jean Shepardson

_____

S. TODD MITCHELL

APPROVED AS TO FORM.

_____

JOHN SHEPARDSON, Attorney for JAMES SHEPARDSON

_____

DAVID S. SPINI, Attorney for S. TODD MITCHELL

[Proof of Service omitted]

APPENDIX C

COPY

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

No. H033546
Santa Cruz County No. CV155146

[Filed February 1, 2010]

JOHN SHEPARDSON, et. al.,	)
Plaintiffs and Appellants,	)
v.	)
S. TODD MITCHELL,	)
Defendant and Respondent.	)
	)

BY THE COURT*

Appellant's petition for rehearing is denied.

Date: FEB 01 2010 RUSHING, P.J. P.J.

* Before Rushing, P.J., Elia, J., and Duffy, J.

APPENDIX D

IN THE SUPREME COURT OF CALIFORNIA

S180718

Court of Appeal,
Sixth Appellate District - No. H033546

En Banc

[Filed April 14, 2010]

JOHN SHEPARDSON, et. al.,	)
	)
Plaintiffs and Appellants,	)
	)
v.	)
	)
S. TODD MITCHELL,	)
	)
Defendant and Respondent.	)
	)

The request for judicial notice is denied.

The petition for review is denied.

George, C.J., was absent and did not participate.

MORENO
Acting Chief Justice

APPENDIX E

IN THE COURT OF APPEAL

SIXTH APPELLATE DISTRICT

No. H033546

[Filed January 22, 2010]

JOHN SHEPARDSON AS
TRUSTEE FOR THE ESTATE OF
CLARA JEAN SHEPARDSON,
JAMES SHEPARDSON,
INDIVIDUALLY,

Plaintiff and Appellant,

vs.

S. TODD MITCHELL, M.D,

Defendant and Respondent.

Appeal from the Superior Court
for Santa Cruz County

Hon. Paul P. Burdick

APPELLANT ESTATE OF CLARA JEAN SHEPARDSON'S REHEARING PETITION

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QUESTIONS PRESENTED

1. Did the court err in changing the in-court agreement, which had allowed Appellant and its counsel to discuss the subject matter of the lawsuit?

2. Did the court err in changing the definition of defamation?

3. Did the court error in creating a new rule of law that language waiving "unknown" claims to include waiver of Civil Code § 1542 rights?

4. Did the court error in changing the parties' agreement that "Each Party bear their own fees and costs."?

INTRODUCTION

The in-court settlement agreement recited its terms. Respondent subsequently drafted a written agreement that materially exceeded and changed the agreed terms. Appellant Estate of Clara Jean Shepardson seeks this court's confirmation of the precise terms of the in-court agreement.

THE IN-COURT SETTLEMENT TERMS

The parties entered into a "binding, enforceable settlement agreement" on the record [RT 1-19, (15, ls 10-14)].

Contract terms were (RT 1-19):

1) Appellant allowed discussing the subject matter of the lawsuit. "I'm willing to agree to confidentiality as the settlement amount, but I do not agree to muzzle my opinions in the future about the conduct that my mother had inflicted upon by Dr. Mitchell. And so if the scope of the nondisparaging clause is simply that I will not make untrue or inaccurate statements, then I'm agreeable to that. But beyond that, hypothetically, if I were to write an article in the newspaper or a book about this event, I would not want to be sued for violation of a vague statement about nondispargement." (RT 7, ls 12-21)

2) "Parties bear their own fees and costs." (RT 3, ls 7-10)

3) Mutual release of claims, including "unknown" claims (RT 4, ls 10-15)

4) After much discussion, debate and negotiation, the parties, and their counsel agreed to the Trial Judge's expressly stated on the record definition of defamation as a "knowing false statement", and based thereon, the parties agreed not defame each other (RT 1-19).

5) Release applies to all parties and counsel (RT 1-19)

Terms expressly rejected (RT 1-19):

1) Any prohibition about discussing what happened to Clara Jean Shepardson while under care of Respondent Doctor S. Todd Mitchell, or making disparaging comments: "I'm willing to agree to confidentiality as the settlement amount, but I do not agree to muzzle my opinions in the future about the conduct that my mother had inflicted upon by Dr. Mitchell. And so if the scope of the nondisparaging clause is simply that I will not make untrue or inaccurate statements, then I'm agreeable to that. But beyond that, hypothetically, if I were to write an article in the newspaper or a book about this event, I would not want to be sued for violation of a vague statement about nondispargement." (RT 7, ls 12-21)

Terms not mentioned in the contract (RT 1-19):

1) Any agreement to keep confidential information other than the settlement amount;

2) Waiver of Civil Code § 1542;

3) CACI 1700 and its definition of defamation;

4) Release of entities other than Respondent and his counsel;

Respondent's counsel sought to change the in-court settlement and submitted a Release to

Trial Court that proposed material modifications (CT 438-441):

1) "If the *parties or their legal advisors are asked about this Agreement or the* ***subject matter of the litigation***, the parties shall inform any person who so inquires that the parties have *satisfactorily resolved any disagreement* that may exist between them and have ***agreed not to discuss the matter with anyone.***" (emphasis added) (CT 440-441, para 5)

2) CACI 1700 and its definition of defamation ("For purposes of the interpretation of this paragraph, the term 'defamatory' shall be defined, interpreted and construed according to CACI 1700." (CT 441, para 6);

3) Attorney fees to the prevailing party ("...in the event any action is brought by any of the parties to enforce this Agreement, the prevailing party shall (sic) entitled to reasonable attorney's fees and costs of suit." (CT 441, para 7)

4) Waiver of Civil Code § 1542 ("SHEPARDSON hereby relinquishes and waives all rights conferred upon SHEPARDSON by the provisions of § 1542 of the Civil Code of the State of California, which reads as follows: 'A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.'" (CT 440, para 1B)

5) Release of entities other than the Respondent's counsel (CT439, para 1A; 440, para 4)

Appellant refused to agree to, and rejected, the proposed modifications (RT 252-263):

Appellant's motion to enforce to exact terms of in-court settlement was rejection of Respondent's proposed modifications (RT 252-263).

Trial Court confirmed settlement, and made new contract terms (CT 437-441; RT 252-263):

1) The prohibition about speaking about the subject matter of the lawsuit;

2) Attorney fees to the prevailing party;

3) Waiver of Civil Code § 1542

4) CACI 1700 and its definition of defamation;

5) Release of entities other than Respondent's counsel.

ARGUMENT

I.

A REHEARING IS WARRANTED TO CORRECT ERRORS IN THE DECISION.

A rehearing may be granted on a mistake of fact or law. *In re Jessup's Estate* 81 Cal. 408, 471 (1889).

II.

THE COURT ERRED IN AFFIRMING THE TRIAL COURT ORDER ELIMINATING APPELLANT'S RIGHT TO SPEAK ABOUT THE SUBJECT MATTER OF THE SUIT.

One, Appellant rejected in the settlement the attempt to eliminate their Free Speech rights to discuss what happened to the Decedent while under Respondent's care, which went to the heart of the subject the matter of the lawsuit.

Two, the Trial Court ordered the opposite, that Appellant and its "legal advisors" (if applies to trial counsel another error, given clear and unequivocal on-the record objection) not talk about the subject matter of the case with anyone.

Three, the standard of review is whether there is substantial evidence to support the trial court's ruling. *Terry v. Conlan,* 131 Cal.App.4th 1445, 1455 (2005, 6th Dist., Opin. by J. Rushing, joined by J. Elia and J. McAdams). Substantial evidence must be reasonable, credible and of solid value. *Kuhn v. Department of General Services*, 22 Cal.App.4th 1627, 1633 (1994). Here, there was no evidence, let alone clear and convincing evidence, to support waiver (authority discussed below) of the right to speak about the case (excepting keeping confidential the settlement amount).

Four, Code of Civil Procedure § 1858 states:

> CONSTRUCTION OF STATUTES AND INSTRUMENTS, GENERAL RULE. In the

> construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in the terms or in the substance contained therein, *not to insert what has been omitted, or to omit what has been inserted*; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. (emphasis added)

Thus, the will of the people, as reflected in the statute, prohibits inserting terms not agree to, and it was err for the Trial Court to order waiver of Appellant's Free Speech rights.

Five, trial courts are barred from making terms or adjudicating differences; it can only interpret or settle them. *Terry v. Conlan*, *supra,* at p. 1460 (cited in the Opening Brief and Oral Argument, and omitted from the decision). Thus, both statutory and case law prohibited the court from inserting a term not agreed to—such as waiver of Free Speech Rights to discuss the subject matter of the lawsuit and decedent's mistreatment under Respondent's care.

III.

THE COURT MISCONSTRUED THE SETTLEMENT CONTRACT LANGUAGE CONTRARY TO WELL-SETTLED CALIFORNIA SUPREME COURT LAW SET FORTH IN *CASEY V. PROCTOR.*

One, this court on its own found that the contract and its language waiving "unknown" claims as including waiver of statutory rights under Civil Code

§ 1542. In light of this novel construction, we alert the court that it so broadly interpreted the language that it violated the California Supreme Court's well-settled rule that contract language waiving "unknown" claims alone does *not* waive Civil Code § 1542 rights. *Casey v. Proctor*, 59 Cal.2d 97, 109-113 (Cal. SCt. 1963). The court stated at page 109:

> It therefore appears beyond reasonable doubt that Civil Code § 1542 was intended by its drafters to preclude the application of a release to unknown claims in the absence of a showing, apart from the words of the release, of intent to include such claims.

This long-established rule grounded in public policy was incorporated into the settlement agreement when formed. *Calperto Producers Syndicate v. Woods* Co. 206 C.246, 252 (1929).

Two, the Trial Judge stated on the record: "Typically I do recite on the record that defendants almost invariably insist upon the provision waiving Civil Code Section 1542...." (RT 255, ls 19-24). This comment suggests civil attorneys and the Trial Court commonly know that a general release, unless it specifically cites Civil Code § 1542, does not waive its statutory rights.

Here, there is no evidence of waiver of Civil Code § 1542. To the extent it did, the court erred in relying on unsworn statements of Respondent's counsel (RT 258, ls 9-25). Moreover, claimed lack of objection in *failed* negotiations does not constitute consent to contract modifications, or waiver of rights.

Four, *Drg I Beverly Hills, Ltd, et al. v. Chopstix Dim Sum Café and Takeout III,* 30 Cal.App.4th 54, 61 (1994) states:

> All case law on the subject of waiver is unequivocal:
> "'Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. [Citations]. The burden, moreover, is on the party claiming a waiver of a right to prove it by *clear and convincing* evidence that does not leave the matter to speculation, and *'doubtful cases will be decided against a waiver.'*" (Cites omitted) (emphasis added)

Five, Appellant's motion to enforce the exact settlement terms was a rejection of Respondent's modifications (RT 252-263).

Six, Code of Civil Procedure § 1858 and *Terry v. Conlan, supra*, precluded inserting new terms such as waiver of Civil Code § 1542 into contract.

IV.

THE COURT ERRED IN AFFIRMING THE TRIAL COURT ORDER ALLOWING INSERTION OF ATTORNEY FEES FOR THE PREVALING PARTY, CACI DEFINTION OF DEFAMATION, AND RELEASE OF ENTITIES OTHER THAN THE PARTIES AND THEIR COUNSEL.

One, the in-court settlement established contract terms, and it did call not for a follow-up agreement (RT 1-19).

Two, the settlement expressly stated:

1) "Parties bear their own fees and costs";

2) Defamation being a "knowing false statement".

Three, the settlement agreement did not mention or agree that:

1) The release extend to entities other than the parties and counsel.

Three, post-settlement the Trial Court inserted a prevailing party provision for attorney fees; changed the defamation definition to "...knew the statement was false or had serious doubts about the truth of the statement". CACI 1700; and inserted language of doubtful claims and release of entities other than parties and counsel. These were material changes to the in-court settlement.

Four, as discussed above, there is no evidence the parties agreed to these changes. The motion to enforce was a rejection of these terms. Theses changes violated Code of Civil Procedure § 1858 and *Terry v. Conlan, supra.*

CONCLUSION

The parties struck a bargain, in-court, on the record, before a Judge, with three attorneys present. As required by case and statutory law, we ask the court to enforce the precise settlement terms, no more, and no less.

Respectfully submitted,

Dated: 1/21/01 /s/ John A. Shepardson
John A. Shepardson, Esq.
For Plaintiff and Appellant
Estate of Clara Jean Shepardson

WORD CERTIFICATION

I, John A. Shepardson, certify there are 2,305 words in Appellant's Petition for Rehearing.

Dated: 1/21/01 /s/ John A. Shepardson
John A. Shepardson, Esq.

[Proof of Service omitted]